Supreme Court, U.S.
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No. 01-1707

IN THE

Supreme Court of the United States

WILLIAM ASHTON, *et al.*,

Petitioners,

v.

CITY OF MEMPHIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

The questions presented may be more accurately stated as follows:

1. Can plaintiffs, white males alleging Equal Protection Clause violations in the form of reverse race discrimination in job promotions, meet their burden of proving Article III standing, where the record shows that, due to their low ranking resulting from competitive testing procedures, they would not have been considered for the positions they sought, even in the absence of racial considerations; where the affirmative action program in question has long been discontinued; and where plaintiffs seek no forward-looking relief?

2. Without standing, can these plaintiffs challenge the validity of the competitive testing procedures that produced a rank order list, where the plaintiffs pled that that the procedures in question were valid and proper, and where in any event the issue of validity arose solely to protect minorities and women from the effects of past discrimination?

3. Can the plaintiffs raise an issue of damages without standing?

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STATEMENT

This case does not warrant the Court's attention. It is a fact-specific case and a poor candidate for addressing the issue of standing. Moreover, under this Court's well-established principles, and consistent with the decisions of nearly all other federal courts, Petitioners lack standing. Petitioners suffered no injury-in-fact since under no circumstances would they have been considered for the promotions they sought, even without the existence of the affirmative action plan which they challenge. Further, the affirmative action program in question terminated years ago, and Petitioners seek no forward-looking relief. The other two issues which Petitioners raise are tangential matters which likewise do not merit the Court's attention. The Court recently denied a petition for certiorari in a closely similar case arising out of the Sixth Circuit, *Yeager v. General Motors Corp.*, 67 F. Supp. 2d 796 (N.D. Ohio 1999), *aff'd*, 265 F.3d 389 (6th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 1299 (2002), and should likewise deny this one.

RESPONSE TO FACTUAL BACKGROUND AND PROCEEDINGS BELOW[1]

Respondent submits the following additional facts from the record:

Petitioners state that the November 1974 consent decree which settled the 1974 civil rights action brought by the United States Department of Justice precluded the City from using any standard for employment that did not validly

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1. Record references are to the Appendix filed with the Sixth Circuit Court of Appeals.

measure qualifications for the position. Petition at 3, citing *Aiken v. City of Memphis*, 37 F.3d 1155, 1158-59 (6th Cir. 1994) (en banc). It should be added that this decree arose in response to claims of discrimination with respect to African American and female individuals. Its stated purpose was "to insure that blacks and women are not placed at a disadvantage by the hiring, promotion and transfer policies of the City, and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunities will be provided to all." *Aiken*, 37 F.3d at 1158. The decree identified a "long term goal . . . subject to the availability of qualified applicants" of "achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force." *Id.* at 1159. Thus the concern over validity of standards was aimed at the protection of minorities and females. Petitioners, current and former patrol officers for the Memphis Police Department, are white males.

Likewise, the March 1979 consent decree that arose from 1975 litigation initiated by the Afro-American Police Association provided that the use of a properly validated test would serve as a defense to any failure to promote African Americans in the percentages set forth in the decree. *See Aiken*, 37 F.3d at 1164 and *Ashton v. City of Memphis*, 49 F. Supp. 2d 1051, 1060 n.6 (W.D. Tenn. 1999).[2] Again, test validity was designed to protect minorities, on the implicit assumption that any problems with validity would adversely impact minorities and, correspondingly, favor whites.

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2. Subsequent consent decrees reaffirmed the essential purposes and features of the earlier decrees. *Aiken*, 37 F.3d at 1159-1160.

As the Sixth Circuit Court of Appeals noted, the City conceded that some of the original plaintiffs suffered an injury in fact and had standing, those white officers who would have received promotions if they had not been "bumped" by African American officers pursuant to the affirmative action program. The City settled with those plaintiffs, leaving in this litigation only those officers who were far down the ranking list. *Aiken v. Hackett*, 281 F.3d 516, 518 (6th Cir. 2002). This group, the Petitioners, is comprised of 15 original plaintiffs from *Ashton v. City of Memphis*, 1996 U.S. App. LEXIS 34357, 1996 WL 748163 (published in table format at 105 F.3d 659 (6th Cir. Dec. 30, 1996), and 11 of the original plaintiffs from *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994).

In their description of the 1988 and 1989 promotion procedures about which they complain, Petitioners fail to highlight several important points.

First, the promotional process which the City used was incorporated into the applicable Memorandum of Understanding ("MOU") between the City and the Memphis Police Association, the recognized representative of the employees in certain ranks of the Police Department. Apx. 196.

Moreover, although the 1988-1989 promotional process had not been formally validated under EEOC guidelines, Petitioners' Second Amended Complaint, their final pleading, declared that "[t]he promotional testing procedures utilized by the defendant were fair and racially neutral and were substantially in compliance with all applicable laws and regulations, . . . and . . . all employees had an equal opportunity to compete for the promotions according [to]

the terms of the [MOU]."[3] Apx. 93. The MOU was negotiated with the understanding that the promotional procedures would be implemented consistent with the affirmative action provisions of the then-pending court-approved consent decrees designed to remedy any past discrimination within the Police Department. Apx. 281.

After completion of the competitive stages of the promotional process, the City's Police Director conferred with City representatives, including City personnel and attorneys, regarding the results of the process, its impact upon minorities, and what steps were needed in order to assure compliance with the applicable consent decrees. Apx. 479.

Petitioners also fail to make clear that based on their test scores and resulting rank order, under no circumstances, even without an affirmative action decree in place, would they have even been considered for promotion to sergeant. The following facts demonstrate this point.

In 1988, a total of 210 officers (including the *Ashton* plaintiffs) competed for 75 openings for the rank of sergeant. Apx. 197. The applicants were ranked in accordance with a composite score, as described in the Petition. Among the top

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3. Petitioners claim that they later realized that this allegation in their Second Amended Complaint was not true, and note that Fed. R. Civ. P. 15(b) allows for the liberal amendment of pleadings. Petition at 9-10 n.7. In essence they now ask this Court to grant them an amendment, or to treat their pleadings as if they had been amended. That is hardly an appropriate request to direct to the United States Supreme Court. As Petitioners concede, a formally validated promotion procedure went into effect in 1995. Petition at 5-6.

75 scorers were seven African-Americans and none of the present plaintiffs. Apx. 197. To comply with the then-outstanding consent decrees, the City "bumped" 19 white officers who had scored within the top 75 competitors to make room for 19 African Americans who had not scored within the top 75. Apx. 154. None of the present plaintiffs were bumped. Apx. 154; *Aiken*, 281 F.3d at 518.

In 1989, a total of 177 officers (including the *Aiken* plaintiffs) competed for 94 openings for the rank of sergeant. Apx. 467. The same tests and composite scores were used. This time 15 African-American candidates scored within the top 94. *Id.* None of the present plaintiffs did. *Id.* Again to comply with the consent decrees, the City promoted those 15, plus another 18 African-American candidates whose scores fell below those of the top 94. *Id.* Accordingly, the City found it necessary to bump 18 whites among the top 94 scorers. *Id.* Once again, none of the present plaintiffs were bumped. *Id.*; *Aiken*, 281 F.3d at 518.

In this connection the district court found the following as fact:

> Plaintiffs do not dispute, and have offered no evidence, that absent the City's use of affirmative action the promotions would have been made other than in accordance with strict rank-order.
>
> * * *
>
> The court finds that the evidence in the record shows that the plaintiff in question were not ranked high enough to be *considered* for promotions absent the City's use of affirmative action.

Ashton v. City of Memphis, 49 F. Supp. 2d at 1051 (emphasis added), cited with approval in *Aiken*, 281 F.3d at 519.

After the 1989 promotions the City never again used affirmative action in promotions to sergeant, and in May 1997, with the entry of a Second Amended Consent Decree, the City formally discontinued the use of affirmative action in all its police promotional procedures. Apx. 273; *Ashton*, 49 F. Supp. 2d. at 1066, 1074. Petitioners seek no forward-looking relief.

The proceedings below are adequately set forth in the prior opinions of the district court and the court of appeals. Respondent would simply add that Petitioners originally asserted claims under a variety of federal and state laws, but that following the decision of the Sixth Circuit Court of Appeals in *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (en banc), the only claim remaining is Petitioners' claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

There are no "compelling reasons" for the Court to grant this petition. S. Ct. Rule 10. This appeal represents a small final remnant of a matter which has been exhaustively litigated since 1974. All prior plaintiffs with any significant interests, both African-American and white, have had their claims resolved through final court decisions, consent decrees, and settlements. This appeal represents claims asserted by the last remaining group of white male police officers who claim the City denied them promotions to sergeant in 1988 and 1989. At that time certain African American officers were granted promotions pursuant to consent decrees containing

a race-based affirmative action plan designed to remedy the lingering effects of any past discrimination against minorities and women. The present plaintiffs (Petitioners) had no injury in fact not only in that they would not have received the promotions in question, but also because under the selection process, with their low test scores they would not even have been considered for the promotions under any circumstances, even absent the affirmative action plan set in place by the consent decrees. They were completely unaffected by the race-conscious system in place. Therefore they have no standing.

Moreover, the City discontinued its affirmative action program years ago. Further, these remaining plaintiffs seek no forward-looking relief.

All these factors distinguish this case from others in which standing has been found. Under principles which this Court has repeatedly articulated, there is no injury in fact. For the same reasons this unique case, which does not involve recurring events or any ongoing race-conscious system, does not present an appropriate vehicle for the Court to use in addressing standing.

The remaining issues identified by the Petitioners are peripheral questions, peculiar to the facts of this case. They do not meet the criteria for the Court to grant a petition, and they serve only to illustrate the point that this case does not present the kind of record suitable for Supreme Court review.

The district court decided these issues following a full exploration of the documented facts at trial, and issued detailed and specific findings of fact. The court of appeals examined the same record and reached the same conclusion.

The lower courts' determinations arose out of the particularized fact setting of this case. These are not circumstances likely to recur at any other time and place. As such, they do not commend themselves to Supreme Court review.

I. Article III Standing

This case presents no challenge to existing principles of the law of standing. The lower courts' rulings in the case at bar follow this Court's existing decisions on the law of standing, and they are consistent with decisions of nearly all other federal courts. Accordingly, even if Petitioners were correct in their assertion that there exists confusion on some points with respect to the law of standing, no such confusion exists under the facts of this case. This case is thus an inadequate vehicle for the Court to use in resolving any supposed conflict among the circuits.

A. The Results Below are Consistent with this Court's Established Jurisprudence.

The results in this case are well in line with this Court's previous rulings on the subject of standing. There is no need for the Court to grant the Petition simply to reiterate well-established principles.

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The threshold question in every federal case is whether the court has judicial power to entertain the suit. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[T]he party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 104

(1998); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). "[T]he standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498-499.

In a series of cases this Court has articulated and refined the "the irreducible minimum" of standing as requiring a showing of three distinct elements:

> First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [citations omitted].

United States v. Hays, 515 U.S. 737, 742-43 (1995) (emphasis added), quoting *Lujan*, 504 U.S. at 560-561. Petitioners' alleged legally protected interest was neither concrete nor particularized, nor was it actual or imminent. For the reasons shown, it was conjectural and hypothetical: What promotions if any *might* they have received *if* there had been no affirmative action plan in place *and if* a different test had been used *and if* on that different test they could have scored high enough to become eligible for available slots? Further, there plainly is no causal connection between the injury (failure to receive a promotion) and the conduct complained of (implementation of an affirmative action plan), since,

as shown, the record reveals that these particular Petitioners would not have received promotions even if no affirmative action plan had existed, as their composite test scores failed to meet the cutoff point. Finally, it is speculative, indeed doubtful, that their alleged injury would be redressed by a favorable decision, as shown by the Petitioners' strained efforts to raise issues of test validity and damages.

Petitioners cite *Heckler v. Mathews*, 465 U.S. 728 (1984) in support of their argument that for standing purposes, injury-in-fact may be found where the challenged action has resulted in the plaintiffs' inability to compete on an equal footing. That case involved entitlement to government-guaranteed benefits (Social Security), as opposed to job promotions to which only qualified employees are entitled. Moreover, in *Heckler* the Court stressed that it recognized noneconomic injuries to victims of discrimination which has the effect of "perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community." *Id.*, 465 U.S. at 739-740. In this case Petitioners are not members of a disfavored group stigmatized as innately inferior; on the contrary, they challenge court-approved efforts to remedy discrimination against disfavored groups. Finally, as the Court later stressed, quoting from *Heckler*, even if a government actor discriminates on the basis of race, the resulting injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984), citing *Heckler*, 465 U.S. at 739-740. As shown, Petitioners were not personally denied equal treatment by the challenged affirmative action program; they were completely unaffected by it. Those white males who were

personally denied equal treatment by the program, *i.e.*, those who were bumped by lower-scoring African American candidates, have had their interests recognized. Petitioners do not fit into that category.

Ignoring the teachings of this long-standing body of precedent, Petitioners rely heavily on their myopic reading of this Court's opinion in *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), where non-minority contractors challenged a municipal ordinance that gave preferential treatment to minority owned businesses (MBEs) in awarding contracts for city projects, resulting in awards to contractors who had not submitted the lowest bid. Specifically, the ordinance challenged in *Northeastern* "earmarked" certain projects for MBEs. Those projects were then "deemed reserved for minority business enterprises only," and non-minority contractors like the plaintiffs were barred from even submitting bids on (*i.e.*, being considered for) those projects. *Id.*, 508 U.S. at 658. The Court held that the non-minority contractors had standing to assert an equal protection challenge to the ordinance even though they failed to allege that they would have been awarded past contracts had the set-aside program not been applied. The Court explained:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the

> denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. 508 U.S. at 666.

Several key distinctions between the facts and analysis in *Northeastern* and those of the case at bar reveal the fallacy of Petitioners' arguments based on that case. First, the ordinance in *Northeastern* involved a reservation or exclusive bidding restriction on certain predetermined projects. The plaintiffs were completely precluded from submitting bids on those projects; only MBEs were even considered for them. As a result, it was impossible to determine who would have received the bids in the absence of the set aside program. By contrast, the promotional process which Petitioners challenge in this case was open to all eligible candidates who wished to compete. As the district court observed, "there was no absolute bar to the promotion of white qualified candidates in 1988 or 1989, and in fact the majority of promotions went to such candidates." *Ashton*, 49 F. Supp. 2d at 1073. Petitioners competed head-to-head with minority candidates through each stage of the four-stage promotional process but failed to achieve scores high enough to be considered for promotion even before affirmative action was applied.

Second, the nature of the injury and relief claimed by the *Northeastern* plaintiffs distinguishes it from the present case. In *Northeastern* the claimed injury of the non-minority contractors was not that they had competed for, attempted to compete for, or had been denied a contract as a result of the ordinance, but rather that they would be prevented from competing for such projects in the future. Further, they sought forward-looking relief in the form of injunctive relief,

not backward-looking relief in the form of damages or in the form of awards of contracts already awarded. Petitioners here claim only a past injury (*i.e.*, promotions lost in 1988 and 1989), and seek only backward-looking relief in the form of, *inter alia*, retroactive promotions and damages for the loss of promotions awarded in the past.

Other decisions of this Court reiterating traditional principles of standing illustrate the limited nature of the holding in *Northeastern* and support the conclusion reached by the courts below in this matter.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), a case Petitioners ignore, the Court addressed a contract bidding scheme that favored minorities. Subcontractors who were not categorized as disadvantaged business enterprises ("DBEs") challenged the government's subcontractor compensation clauses which provided financial incentives to general contractors who subcontracted with DBEs on government projects. Both Adarand (a non-DBE) and Gonzales Construction Company (a DBE) were subcontractors who submitted bids to a general contractor for a highway construction project. *Id.*, 515 U.S. at 205. Adarand submitted the low bid, but due to the subcontractor compensation clause, the general contractor awarded the contract to the DBE. *Id.*, 515 U.S. at 209-10. Adarand sued to obtain both backward-looking relief for the lost contract and forward-looking relief for its inability to compete on equal footing with DBEs for contracts it would bid on in the future. *Id.*, 515 U.S. at 210-11.

With respect to Adarand's claim for backward-looking relief, the Court noted that "Adarand's allegation that it *has lost* a contract in the past *because of* a subcontractor

compensation clause . . . entitles it to seek damages for the loss of that contract. . . ." *Id.*, 515 U.S. at 210 (emphasis added). Moving then to Adarand's claim for forward-looking relief, the Court referred for the first and only time to its decision in *Northeastern*:

> If Adarand is to maintain its claim for *forward-looking relief*, our cases require it to allege that the use of subcontractor compensation clauses *in the future* constitutes "an invasion of a legally protected interest. . . . [citations omitted]." . . . Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury *in cases of this kind* is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing."

Adarand, 515 U.S. at 211 (emphasis added), citing *Northeastern*, 508 U.S. at 667.

Thus, only in cases of forward-looking relief, and cases where it is impossible to identify exactly which plaintiffs were harmed by the challenged conduct, may it be appropriate to re-characterize the injury as denial of an opportunity to compete. Neither of those factual scenarios exist in this case. Petitioners seek no forward-seeking relief, and it is possible to identify precisely those who were impacted by the use of affirmative action.

With respect to the contract already competed for, the Court in *Adarand* applied a traditional standing analysis. The record established that Adarand had competed, that he was the low bidder, and that but for the subcontractor

compensation clause, he would have been awarded the contract.[4] Accordingly, there was no need to apply the *Northeastern* analysis to that claim for relief.

Adarand thus reinforces that in equal protection challenges to affirmative action such as that at issue here, where it is clear who would have been awarded the benefit in the absence of affirmative action, standing for purposes of backward-seeking relief is to be determined by whether the plaintiff *has lost* a benefit *because of* the alleged discriminatory barrier. As in *Adarand* with respect to the 1988 and 1989 promotions challenged by Petitioners, Petitioners competed in the process; it is known where they ranked following the competition; and it also known that the use of affirmative action had no impact on their ability to be promoted.

Under the principles set forth in *Northeastern* and *Alarand*, Petitioners lack standing. The Sixth Circuit recognized these principles in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied sub nom.*, 510 U.S. 1164 (1994), a case Petitioners likewise ignore. The Tucker plaintiffs in *Brunet* were male firefighter candidates who alleged that the hiring of certain female firefighters pursuant to the affirmative action provisions of a consent decree violated male applicants' equal protection rights. *Id.*, 1 F.3d at 392. The four Tucker plaintiffs competed for 36 available positions.[5] Tudor, Meyer and Hilleary ranked 36, 38 and 44, respectively. Tucker did not rank high enough to even be included on the eligibility

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4. The Court noted that Adarand submitted an affidavit from the general contractor stating that it "would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead." *Id.*, 515 U.S. at 205.

5. The class was later enlarged to 38.

list. All four Tucker plaintiffs ranked above the highest ranking woman. Although the consent decree called for the top 34 and top two women to be hired, in the absence of affirmative action no women would have been hired. *Id.*, 1 F.3d at 398. Affirmative action was applied, and two women, both of whom ranked below the Tucker plaintiffs, were hired.

Relying partly on *Northeastern* in its ruling, the Sixth Circuit found it was possible under the facts of *Brunet* to determine who was affected by the use of affirmative action. The court held that, in the context of affirmative action programs relating to employment decisions, the challenger need not allege that he *would have obtained* the job but for the challenged barrier erected, but he must, at a minimum, show that but for the barrier, he would have been *considered* for the job. *Id.*, 1 F.3d at 397. Even under that analysis, however, the court noted that the two lowest ranking plaintiffs, Tucker and Hilleary, lacked standing to challenge the City's failure to hire them based on their respective rankings on the certified list for the incoming firefighter class.

> Tucker was not on the certified list for the August, 1991 class. Thus at this time, Tucker was not eligible for consideration. Moreover, Tucker's low rank would have eliminated him from consideration for the August, 1991 class. . . . Similarly, the consent decree did not adversely affect Hilleary's selection to the August, 1991 training class. . . . Assuming *arguendo* that the City would have still hired a class of 38 even in the absence of the consent decree, the facts show that the last candidate hired was Meyer, number 38. Under the

> Rule of Three, the City still would have only reached candidate 40 in its consideration for the 38th position in the class; Hilleary ranked 44.[6]

Id. 1 F.3d at 398-99. By contrast, plaintiffs Tudor and Meyer, who ranked 36 and 38, respectively, would have been considered for the 36th position and would have had standing.[7]

Other courts facing closely similar facts have reached similar conclusions. *See, e.g., Grahek v. City of St. Paul*, 84 F.3d 296, 298-99 (8th Cir. 1996); *Donahue v. City of Boston*, 183 F. Supp. 2d 202, 206-209 (D. Mass. 2001); *Yeager v. General Motors Corp.*, 67 F. Supp. 2d 796, 800-02 (N.D. Ohio 1999), *aff'd*, 265 F.3d 389 (6th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 1299 (2002); *Erwin v. City of Chicago*, 1998 WL 704295, 1998 U.S. Dist. LEXIS 15730 at *11-14 (N.D. Ill. Sept. 30, 1998); *McNamara v. City of Chicago*, 959 F. Supp. 870, 872 (N.D. Ill. 1997), *aff'd*, 138 F.3d 1219, 1221 (7th Cir.), *cert. denied*, 525 U.S. 981 (1998); *Paganucci v. City of New York*, 785 F. Supp. 467, 474-75 (S.D. N.Y. 1992), *aff'd*, 993 F.2d 310 (2d Cir.), *cert. denied*, 510 U.S. 826 (1993).

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6. Although the plaintiffs in *Brunet* filed suit prior to commencement of the August 1991 class, the determination of who would be included on the list and each individual's respective ranking had already been made. The court implicitly opined that although the Tucker plaintiffs specifically sought only future relief in their Complaint, had the City proceeded with hiring for the August 1991 class based upon the already-determined list, Plaintiffs Tucker and Hilleary would have lacked standing to challenge that process.

7. Because Tudor and Meyer were ultimately hired and included in the August 1991 class, however, their dates of hire were not affected by operation of the consent decree. Their claims for relief relating to their hiring became moot, and they lacked standing to challenge their hiring. *Id.* at 399.

Here, it is undisputed that Petitioners competed on equal footing for all available positions in the promotional process. Apx. pg. 97. They can show neither that they would have obtained a promotion nor that they would have been considered for promotion based upon their rank order standing in the absence of an affirmative action program. As noted by the district court, Petitioners' claims are analogous to the claims of Tucker and Hilleary in that the facts show that Petitioners ranked too low to be included among the top 75 individuals would have been considered for promotion in 1988, or among the top 94 who would have been considered for promotion in the 1989 process if the alleged racial barrier had never been applied. Apx. 136. Accordingly, the courts below correctly held that the Petitioners lack standing to challenge those promotions.

Petitioners' reliance on *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), is misplaced. Bakke sued after twice being denied admission to University of California medical school due to the application of a "special admission program." Under the program, only "disadvantaged members" of certain minority races were considered for 16 of the 100 places in the entering class. Individuals eligible for the special admissions program competed for admission only against others in the program. Bakke, a non-minority, was denied admission under the school's general admission program while applicants with lower examination scores were admitted under the special admissions program.

The case came to this Court from the California Supreme Court, which had held that the special admissions program violated, *inter alia*, the Equal Protection Clause. *Id.*, 438 U.S. at 269, 278-79. Without addressing the equal protection claim, the California Supreme Court initially remanded the

case for consideration of whether the University could show Bakke would not have been admitted even in the absence of the special program. When the University conceded that it could not make such a showing, the state court ordered Bakke's admission. In a footnote in *Bakke* the Court credited the state court's finding that standing was conferred by "the University's decision not to permit Bakke to compete for all 100 places in the class." *Id.*, 438 U.S. at 268, 280 n.14. However, the Court made this observation only after noting the University's concession that it could not prove that Bakke would not have been admitted in the absence of the special program was enough to confer standing. *Id.* In *Bakke* the Court did not depart from its traditional standing requirement that a plaintiff must allege "facts from which it reasonably could be inferred that, absent the [alleged discriminatory barrier], there is a substantial probability that [plaintiff] would have been able to [obtain the benefit] and that, if the court affords the relief requested, the asserted inability of [plaintiff] will be removed," *Warth v. Seldin*, 422 U.S. at 504, or that the injury suffered by the plaintiff be "fairly traceable" to the defendant's allegedly unlawful conduct. *Allen*, 468 U.S. at 757.

Unlike Bakke, it is undisputed that Petitioners in this case would not have been promoted in the absence of affirmative action. Further, Petitioners here were not excluded from competing for available positions. They were permitted to, and did, compete for each of the projected number of promotions but failed to rank high enough (before affirmative action) to be considered for promotion. Although they have attempted to re-characterize their alleged injury during the course of this appeal, their ultimate claim is, and has always been, that after competing in a fair and racially neutral promotional process which demonstrated they would not

receive promotions, they were denied promotions. Their claims are, thus, more akin to the arguments of the plaintiffs in *Warth v. Seldin* and *Allen*, in which this Court found standing not to exist.

In the case at bar the Sixth Circuit properly relied on one of this Court's more recent pronouncements on the subject of standing in *Texas v. Lesage*, 528 U.S. 18 (1999), a decision Petitioners criticize. Petition at 19-21. In that case a university undisputedly considered race in its admissions decisions for a Ph.D. program. A rejected white applicant for the program sued for money damages and injunctive relief under, *inter alia*, 42 U.S.C. § 1983 and the Equal Protection Clause. Reversing the Fifth Circuit's reversal of summary judgment for the university, the Court explained the situation of a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief:

> Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.
>
> Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is "the in ability to compete on an equal footing." [citations omitted] But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for

> forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.

Id., 528 U.S. at 21.[8]

It is absolutely clear from the record in this case that the use of affirmative action had no impact on Petitioners' ability to compete for their ranking on the composite list or on their respective competitive positions on that list following the promotional procedure. If affirmative action had not been applied, only the highest ranking 75 (Ashton/1988) and highest ranking 94 (Aiken/1989) individuals from the composite list would have been considered for promotion and/or ultimately promoted. All the Petitioners ranked below 75 and 94, respectively. A mere allegation of racial preference is insufficient to confer standing, especially where, as here, the preference had no impact on these Petitioners' ability to compete for or obtain the benefit claimed.

In sum, well-established principles set forth by this Court show that Petitioners lack standing because they could not demonstrate that they would have been considered for promotion, or that they were prevented from competing on an equal footing with other candidates for promotion. Further, they do not challenge an "ongoing race-conscious program" and do no seek "forward-looking relief," *Lesage*, 528 U.S. at 21, but rather seek backward-looking damages only for

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8. The Court noted that the Fifth Circuit failed to distinguish between Lesage's retrospective claim for damages and his forward-looking claim for injunctive relief based on continuing discrimination. *Id.*, 528 U.S. at 21.

themselves. There is no injury in fact, nor any causal connection required in order to invoke standing before the federal courts. The lower courts correctly so held, and no useful purpose would be served by the Court granting the Petition sole to restate its prior holdings.

B. The Results Below are Consistent with Decisions of Other Federal Appellate Courts.

In an effort to portray a split in the lower courts, Petitioners cite cases in two circuits other than the Sixth Circuit, *Wooden v. Board of Regents of the Univ. System of Georgia*, 247 F.3d 1262 (11th Cir. 2000) and *Price v. City of Charlotte, N.C.*, 93 F.3d 1241 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). Yet it is unclear that either of these courts would have decided this case differently.

In *Wooden*, various unsuccessful applicants for admission to a state university challenged the university's freshman admissions policies as impermissibly favoring non-whites over whites. Petitioners omit some critical facts of that case, facts which reveal why the principles enunciated in *Wooden* would have led to the same conclusion which the courts below reached on the facts of the present case.

In *Wooden* the university's challenged system divided the admissions policy into three stages. At the initial stage (the "AI stage"), the university automatically admitted applicants with academic indices and scores above a certain number, automatically rejected those below a certain level, and set aside for "further evaluation" the group whose numbers fell in a middle ground. All decisions at the AI stage were made without regard to race. However, for those middle-level applicants set aside for further evaluation, race was one factor among others that were considered.

In their summary of *Wooden* Petitioners refer only to the claim of Mr. Green, a white applicant whose indices and test scores enabled him to pass the AI stage, where race was not considered, placing him in the pool for further evaluation, where race was considered. He was ultimately denied admission, and he asserted that the university's race-conscious system placed him at a disadvantage. The Eleventh Circuit Court of Appeals held that Green had standing to assert his claim, because he reached the second stage of the process, and at that point he could not compete on an equal footing with non-white applicants. He thus suffered a "direct exposure to unequal treatment." *Id.*, 247 F.3d at 1280. By contrast, another white applicant, Ms. Davis, was rejected during the race-neutral AI stage of the process because her academic performance fell below the minimum requirements for passage into the next stage; that is, she was never even considered for admission because her numbers were too low. Citing this Court's decisions reviewed above, the Eleventh Circuit held that Davis lacked standing, since she had no injury in fact:

> [Davis'] position would virtually abolish the injury-in-fact requirement in this context, conferring a cognizable injury on every unsuccessful applicant for a government contract or admission to a public university where the process at some stage or for some purposes disfavors the applicant's racial group in favor of another, *regardless* of whether the plaintiff herself was actually treated unfairly. The law does not go that far.

Id., 247 F.3d at 1282 (emphasis in original).

Similarly, in this case Petitioners never passed beyond the first stage in the promotions process because their composite scores were too low. At that point all applicants were treated the same, regardless of race. Petitioners therefore had no "direct exposure to unequal treatment." Only in the second stage of the process was an applicant's race considered. Under the *Wooden* analysis, as under the Sixth Circuit's analysis in this case, Petitioners lack standing. There is no "conflict" for this Court to resolve.

Price is a closer decision; Respondent disagrees with the result in that case. However, there is at least one critical distinction between *Price* and the case at bar. The district court opinion in *Price* reveals that injunctive relief was sought and awarded in order to address an ongoing race-conscious promotions system, *Hayes v. City of Charlotte, N.C.*, 802 F. Supp. 1361, 1377 (W.D.N.C. 1992), a crucial factor absent from the present case. Moreover, the Fourth Circuit's opinion in *Price* focuses largely on issues of damages rather than standing. *Price* by itself hardly creates an inter-circuit conflict on the law of standing sufficient to warrant this Court's attention.

Finally, Petitioners cite three other decisions, *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001), *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074 (10th Cir. 1998), and *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000). None of these cases address the issue of standing. Accordingly, they do not represent the presence of a conflict in the law of standing which this Court needs to resolve.

II. Test Procedures

In a classic red herring, Petitioners ask the Court to hear their challenge to the validity of the test procedures giving rise to the rank order list, by which they failed to qualify for consideration for the promotions in question. This is plainly improper given the record and procedural posture of this case.

First, as shown, in their final pleadings Petitioners affirmed the validity of the test giving rise to the rank order. Apx. 93.

In any event, the issue of test validity arose in the context of assuring that the test would be free from any bias that would prejudice minority or female candidates; thus any invalidity would presumably favor the Petitioners, who are white males. *Aiken*, 37 F.3d at 1158, 1159, 1164; *Ashton*, 49 F. Supp. 2d at 1060 n.6. Further, it is undisputed that a formally validated test was developed in 1996, settling the matter in terms of any prospective action or relief. *Ashton*, 49 F. Supp. 2d at 1060.

Finally, as shown by the cases Petitioner cites (Petition at 27-29), this issue goes to the merits of the case, not to the question of standing. As for the merits, this Court has held that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Lesage*, 528 U.S. at 20-21 (citing *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

III. Damages

Petitioners also wish to raise issues relating to damages. Once again, the record and procedural posture of this case reveal the impropriety of raising the issue at this point. Without standing, not even the threshold issue of liability is reached, much less the subsequent question of damages. There is no substantial conflict or confusion on theses issues that would justify the Court's granting the petition.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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